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No. ....

IN THE

Supreme Court of the United States

October Term, 1983

ALYESKA PIPELINE SERVICE COMPANY, a Delaware Corporation, Individually and as Agent for Amerada Hess Pipeline Corporation; ARCO Pipe Line Company; BP Pipelines, Inc.; Exxon Pipeline Company; Phillips Alaska Pipeline Company; Sohio Pipe Line Company; and Union Alaska Pipeline Company,

Petitioner,

vs.

The Vessel BAY RIDGE, *in rem*, and UNITED STATES TRUST COMPANY, RICHMOND TANKERS, INC., SEATRAIN LINES, INC., and PIERCE TANKERS, INC., as claimants,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

On May 19, 1980, petitioner filed an *in rem* action to enforce its maritime lien against the vessel BAY RIDGE for damages arising out of an oil spill incident. It caused the vessel to be seized and security was then posted.

Respondents subsequently filed a motion to dismiss the action, alleging an unconstitutional seizure because there was no pre-seizure hearing. The District Court ruled that Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims was unconstitutional and dismissed the action. Respondents then filed a motion to exonerate the security. Before petitioner could respond as provided by local rules or post a supersedeas bond under Rule 62(a) of the Federal Rules of Civil Procedure, and without prior notice, the District Court released the security pursuant to Supplemental Rule E(5)(c). Petitioner appealed the dismissal of the *in rem* action. Respondents moved to dismiss the appeal on the ground that release of the *res* deprived the court of appellate jurisdiction. The Court of Appeals dismissed the appeal. The unconstitutionality decision is thus final.

The questions presented are:

(1) Whether the release of the *res* was timely because Rule 62(a) and Supplemental Rule E(5)(c) are irreconcilably conflicting as the Court of Appeals concluded.

(2) Whether petitioner was denied procedural due process because it had no forewarning of the invalidity of Rule C, because it had no meaningful opportunity to prevent the release of the *res* and because the pendancy of a second action will not cure significant prejudicial aspects of the lower courts' rulings.

(3) Whether procedural due process requires a pre-seizure hearing before a vessel can be seized pursuant to Supplemental Rule C, even when a prompt post-seizure hearing is held.

Parties.

The parties to the proceeding in the District Court; and subsequently the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed, are all listed in the caption of this case in this Court. Pursuant to Rule 21.1(b) and Rule 28.1 of the Supreme Court of the United States, the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner are as follows:

Alyeska Pipeline Service Company is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company; Amerada Hess Pipeline Corporation is wholly owned by Amerada Hess Corporation; ARCO Pipe Line Company is wholly owned by Atlantic Richfield Company; BP Pipelines, Inc. is wholly owned by BP North America, Inc., which is wholly owned by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd., which is wholly owned by The British Petroleum Company Limited; Exxon Pipeline Company owns an interest in Dixie Pipeline Company, Plantation Pipeline, Qualbank, Inc., West Shore Pipe Line Company, and Yellowstone Pipe Line Company and is wholly owned by Exxon Corporation; Mobil Alaska Pipeline Company is wholly owned by Mobil Oil Corporation, which is wholly owned by Mobil Corporation; Phillips Alaska Pipeline Corporation is wholly owned by Phillips Investment Company; Sohio Pipe Line Company is wholly owned by the Standard Oil Company (an Ohio corporation) in which a controlling interest is held by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd., which is wholly owned by The British Petroleum Company Limited; and Union Alaska Pipeline Company is wholly owned by Union Oil Company of California.

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ALYESKA PIPELINE SERVICE COMPANY, a Delaware Corporation, Individually and as Agent for Amerada Hess Pipeline Corporation; ARCO Pipe Line Company; BP Pipelines, Inc.; Exxon Pipeline Company; Phillips Alaska Pipeline Company; Sohio Pipe Line Company; and Union Alaska Pipeline Company,

Petitioner,

vs.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The opinion of the Court of Appeals in *Alyeska Pipeline Service Company v. The Vessel BAY RIDGE*, 703 F.2d 381 (9th Cir. 1983) and the opinion of the District Court dismissing the *in rem* action on constitutional grounds, 509 F.Supp. 1115 (D. Alaska 1981), appear in the Appendix to this petition.

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered on April 4, 1983. A timely petition for rehearing was denied on August 4, 1983. This Court granted an extension of time for petitioner to file this petition to and including December 1, 1983. This petition was timely filed, invoking the Court's jurisdiction under 28 U.S.C. § 1254(1).

Procedural Rules Involved.

Rule 62(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Automatic Stay; Exceptions—Injunctions, Receiverships, And Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry."

Supplemental Rule A of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "The General Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."

Supplemental Rule C(3) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "PROCESS. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel. . . ."

Supplemental Rule C(4) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "NOTICE. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5)."

Supplemental Rule E(5)(c) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action. . . ."

Local Rules of Practice for the United States District Court, District of Alaska, Rule 5(B)(2) provides as follows:

> "(2) Each party opposing the motion or other application shall, within fifteen (15) days after service of the motion or other application upon him, unless otherwise ordered by the Court or otherwise stipulated in writing by the parties, subject to the approval of the Court:
>
> (a) serve and file legible copies of all documentary evidence upon which the party intends to rely and
>
> (b) serve and file a clear, concise, complete and candid written statement of the reasons in opposition thereto and an adequate answering brief of points and authorities or
>
> (c) serve and file a written statement that he will not oppose said motion."

Statement of the Case.

On April 14, 1980,[1] a major oil spill involving the vessel BAY RIDGE occurred on the waters of Valdez harbor, Alaska. Petitioner incurred substantial damages as a result of the spill. Pursuant to 28 U.S.C. § 1333, petitioner filed an *in rem* action in District Court to enforce the maritime lien which arose in its favor due to the incident. On May

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[1]Except where indicated, references to all dates can be found in the appended opinions and order.

19, 1980 the BAY RIDGE was seized by the U.S. Marshal. In arranging for the issuance of the warrant and the arrest of the vessel, petitioner complied completely with every procedural rule set forth in Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims. At the post-seizure hearing in Anchorage, Alaska on May 20, 1980, the next day, respondents made a restricted appearance on behalf of the vessel as permitted by Supplemental Rule E(8). After a substitute *res* was posted, the vessel was released on May 21. Respondents subsequently filed a motion to dismiss the *in rem* action, alleging that the issuance of the warrant and the arrest without notice were unconstitutional.

On March 16, 1981, the District Court ruled in the decision appearing in the Appendix that the seizure violated respondents' right to due process. The *in rem* action was dismissed without prejudice and judgment was entered on March 17. On March 18, respondents filed a motion for an order exonerating the Stipulation for Value, which at that point had been substituted as the jurisdictional *res* for the *in rem* claim pursuant to Supplemental Rule E(5). This motion was received by mail in the offices of petitioner's attorney on March 19. *See* Petitioner's/Appellant's Opposition to Motion to Dismiss Appeal at p. 2.

On March 23, after an intervening weekend, and before the expiration of the ten day period in Rule 62(a) of the Federal Rules of Civil Procedure staying enforcement of a judgment and before the expiration of the fifteen days allowed under Local Rule 5 for opposing parties to act in response to a motion, the District Court discharged the security without notice or a hearing. When informed of that action, petitioner immediately sought relief from the District Court to preserve or reinstate the *res*. Its motions were denied, again without any hearing.

On March 24, the day after the *res* was released, a second, protective *in rem* action was filed by petitioner. This time, a pre-seizure hearing was held. The respondents immediately sought to have the arrest warrant quashed by claiming that the vessel had been discharged from the lien by the posting of the substitute *res*, since exonerated. The District Court rejected that argument. Explaining its action, the court stated that it intended the release of the *res* and judgment of dismissal in the first case to be without prejudice to petitioner's *in rem* rights. In the court's view, compliance with new procedural requirements now permitted a second seizure by petitioner as if the first had never occurred. *See* the April 15, 1981 Order on Claimants' Motion for Reconsideration, appearing in the Appendix. Nevertheless, respondents continue to raise that defense in the pending action and have counterclaimed for wrongful arrest in connection with the first seizure. As will be discussed below, this second action does not cure the prejudice petitioner suffers as a result of the dismissal of the first action and the premature release of the *res*.

Petitioner filed a timely appeal of the District Court's dismissal of the first action. Respondents cross-appealed on the question of whether a maritime lien existed. Respondents also moved for dismissal of the appeal on the grounds that exoneration of the *res* now deprived the appellate court of jurisdiction to hear the appeal. After having the case briefed in full, including the jurisdictional issue, and after having heard oral argument, the Court of Appeals dismissed both appeals in the reported decision appearing in the Appendix.

On appeal, petitioner had contended, *inter alia*, that the District Court's release of the *res* was improper or inadvertent, thus triggering an exception to the rule that absence of the *res* barred consideration of the appeal. *See The RIO GRANDE*, 90 U.S. (23 Wall.) 458 (1875). The majority on

the appellate panel concluded that Rule E(5)(c) permitted the District Court to authorize the release of *in rem* security "as of course" in spite of the 10 day hiatus provided by Rule 62(a). Language in Supplemental Rule A, which provides that the Supplemental Rules are to control for any conflict between the Supplemental Rules and the general federal procedural rules, was the determinative factor for the majority. Hence there was no occasion to apply the rule of the *RIO GRANDE*. In contrast, the concurring opinion saw no need for there to be an inconsistency between Rule 62(a) and Supplemental Rule E(5)(c). The concurring judge viewed the court's reconciliation of the two rules as unnecessary, unfortunate and a cause for substantial concern in the future.

There was no dissent because the concurring judge assumed that petitioner's appeal was moot due to the pendancy of the second action. This is not correct for several reasons. First, dismissal of the appeal makes the unconstitutionality ruling final. Thus petitioner is foreclosed from defending against the respondents' wrongful arrest counterclaim in the pending case on the ground that the seizure was constitutional in the first place. No matter what happens in the second action, this defense is denied petitioner as a result of the dismissal of the first action. This alone demonstrates that the issues raised by the dismissal are not moot. Second, petitioner was assessed costs by the District Court when the first action was dismissed. Therefore, it will suffer definite monetary harm if this petition is not granted. Last, there are the ramifications which flow from the premature release of the *res*.

In their response to the second *in rem* action respondents have raised as an affirmative defense their claim that petitioner's maritime lien against BAY RIDGE is forever discharged. If this defense ultimately prevails, either because

the District Court changes its mind, or because an appellate court agrees with respondents, there would be no basis for having seized the vessel the second time, and without any *res*, there would be no jurisdiction to hear the *in rem* action against the vessel. Petitioner's *in rem* claim would be extinguished. Furthermore, if this Court does not consider the circumstances surrounding the release of the *res* now, no other court will ever have an opportunity to do so.

As will be discussed below at pages 9 and 10, certain aspects of petitioner's case cannot be cured by the availability of *in personam* defendants in the second action. Thus, the constitutionality of the first seizure and the problems created by the premature release of the *res* are still issues requiring resolution now.

REASONS FOR GRANTING THE WRIT.

1. Whether Supplemental Rule E(5)(c) Must Necessarily Conflict With and Supercede the Time Period of Rule 62(a) Is an Important Question of Federal Procedural Law Which Should Be Settled by This Court.

This Court has the general power to promulgate federal procedural rules, 28 U.S.C. § 2072, and a concomitant interest in overseeing interpretations given to those rules by lower courts, especially admiralty decisions by circuit courts, which tend to have far-reaching precedential value. Petitioner submits that there is no sound justification for the interpretation the Court of Appeals gave to Rule 62(a) and Supplemental Rule E(5)(c). There are, however, manifest legal and practical reasons why that interpretation should be rejected.

In the first instance, that interpretation was unnecessary. The Court of Appeals defined the "as of course" language in Supplemental Rule E(5)(c) to mean immediate action was authorized. It is equally logical to interpret the clerk's "as of course" authorization to mean that his authority to release the *res* only begins to run after the 10-day period in Rule 62(a) has elapsed. The concurring opinion below saw no justification for creating an inconsistency where none need exist. 703 F.2d at 386.

When analyzing the interplay of procedural rules, petitioner submits that rules should be harmonized wherever possible rather than set at odds. *Elster v. Alexander*, 75 F.R.D. 458, 461 (N.D. Ga. 1977); *Application of the Royal Bank of Canada*, 33 F.R.D. 296, 300 (S.D.N.Y. 1963). Overly technical rule interpretations, such as occurred below, are not favored in admiralty. *Acme Boat Rentals, Inc. v. J. Ray McDermott & Co.*, 424 F.2d 393, 395 (5th Cir.

1970). The federal rules themselves have that bias in favor of pragmatic construction of the rules. Rule 1, Federal Rules of Civil Procedure. This is especially so in admiralty where pragmatism and relevance to modern developments have traditionally been the admiralty courts' hallmark. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Swift & Co. v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 691 (1950).

The gloss given to Supplemental Rule E(5)(c) by the Court of Appeals in dismissing the appeal will inject a note of perpetual uncertainty for future litigants where there was none before. There will be uncertainty because a plaintiff's *in rem* claim could be extinguished at any time, without notice or an opportunity to bring error to the court's attention. After the Court of Appeals' decision, the clerk can release the *res* immediately, even if the District Court's dismissal is unexpected by the parties, as could occur, for example, with a *sua sponte* dismissal without prejudice for technical defects in the pleadings.[2] The concurring opinion below recognized, that the majority's reconciliation of these rules could forever "cause substantial rights of the parties to disappear before there is resort to the appellate system." 703 F.2d at 386.

In rem remedies remain a valuable and perhaps sole avenue of recovery in many admiralty cases. The Court of Appeals was incorrect when it stated that parties always have resort to *in personam* jurisdiction as well as *in rem* and, therefore, should not deem it an imposition to assume obligations not expressly required by the federal rules in

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[2]True, litigants could post bonds with the filing of all *in rem* actions, but that is contrary to express rules governing admiralty claims. *See* Supplemental Rules E(2) and E(7). Petitioner submits, as did the concurring opinion, that such a proposal underscores the error in the Court of Appeals' decision rather than justifies its reasoning.

order to prosecute the *in rem* claims. 703 F.2d at 385. On the contrary, *in rem* claims may be the only recourse. For example, when the negligence of a compulsory pilot is charged, the vessel owner is not responsible *in personam* for a pilot negligence, but the vessel itself remains liable *in rem*. *California v. Italian M/S ILICE*, 534 F.2d 836, 841-43 (9th Cir. 1976). A compulsory pilot was in charge of BAY RIDGE for part of the events during the spill. Respondents are not responsible for his negligence, but BAY RIDGE is.

Further, given the frequent international setting with maritime incidents, anyone with a claim against the vessel, be they seamen, longshoremen, suppliers or anyone else, faces the very real problem of finding solvent owners and perfecting *in personam* jurisdiction. Even if personal jurisdiction can be had, there is no absolute assurance that assets other than the vessel will be available to satisfy any judgment.

Therefore, *in rem* actions remain an essential part of an admiralty claimant's rights.[3] Certainly petitioner's *in rem* claim is important of itself. To condition this right on arbitrary bond requirements not called for or envisioned in the rules, at the risk of forfeiting the *in rem* right if the court or the clerk should improvidently dismiss the case and release the *res*, is unnecessary, ill advised, and certain to create confusion and hardship in the future. Under these circumstances, petitioner submits the Court should issue the writ to correct the error below.

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[3]The Maritime Law Association of the United States filed an amicus curiae brief in support of petitioner's appeal of the constitutionality of Rule C. The Association discussed at length in its brief the many practical and commercial factors supporting the admiralty *in rem* practice.

2. The Manner in Which Petitioner's *in Rem* Claim Was Prejudiced With the Rulings Below and Release of the *Res* Was a Denial of Procedural Due Process.

At every stage of the proceedings below, the petitioner urgently sought to bring the dilemma caused by the premature release of the *res* to the attention of the court.[4] The facts of the release speak for themselves. The *res* was released without notice by the District Court and before the ten day period of Rule 62(a) or the fifteen day period of Local Rule 5 had lapsed. This notwithstanding the fact that petitioner had only four days, including the intervening weekend, to act on respondents' motion for exoneration after receipt of the motion in the offices of its attorneys. When petitioner immediately filed motions to have the District Court reinstate or preserve the security, those motions were also denied without any hearing. The District Court may have assumed that there would be no ill-effects, but as discussed in the Statement of the Case above at pages 6 and 7, there were and are. The essence of due process requires that a party be given an opportunity to protect its interests. Petitioner was denied that opportunity.

Furthermore, it was manifestly unfair to apply the pre-seizure hearing requirement to petitioner's *in rem* action after it complied with every procedural detail set forth in the supplemental rules governing admiralty seizures, procedures which have been in force for decades under the

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[4]Petitioner's denial of notice or an opportunity to be heard on the release were quickly brought to the District Court's attention, even before the deadlines set forth in the rules had expired:

> "By motion of March 18, 1981, claimants, through counsel, moved for exoneration of the security posted in the action. Though the normal period of dormancy specified in Civil Rule 62 is yet to conclude, and though the time for plaintiff to respond to the motion provided by Local Rule 5 has yet to run (and in fact will not run until April 6, 1981), plaintiff is advised that the bond has now been exonerated by order of the Court." Petitioner's Memorandum in support of its Motion to Amend or Alter the Judgment dated March 26, 1981, at p. 4, lines 7-14.

earlier General Admiralty Rules, Rules 10 and 37, and since 1966 in Supplemental Rules C and E. The District Court's ruling on the constitutionality of Rule C could have and should have been restricted to prospective application. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982). This is particularly so where there was, as here, a prompt post-seizure hearing and the potential loss of significant rights if the newly proclaimed rule was applied to the case at hand.

Every appellate court which had considered the pre-seizure hearing question before BAY RIDGE's seizure had held Supplemental Rule C to be constitutionally sound. *See, e.g., Amstar Corp. v. S/S ALEXANDROS T*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338 (5th Cir. 1981). To petitioner's knowledge, every appellate court which has considered the constitutionality of Rule C in non-maritime forfeiture proceedings had also concluded that the rule was constitutional. In the Ninth Circuit itself, the Court of Appeals had strongly intimated that Rule C was constitutional in the admiralty context. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982). Indeed, the District Court for Alaska, including Judge Fitzgerald who presided over the case below, had ruled on two prior occasions that Rule C was constitutional. *United States v. KAIYO MARU No. 53*, 503 F.Supp. 1075 (D. Alaska 1980) (3½ months before this case); *Stoner v. Oil Screw NEIKA II*, 1978 A.M.C. 2650 (D. Alaska 1978). *See also A/S Hjalmar Bjorges Rederi v. Tugboat CONDOR*, 1979 A.M.C. 1696 (S.D. Cal. 1979). *See also* Amicus Brief of Maritime Law Association filed in the appeal below, at pages 3-4.

Compounding that, the District Court's and Court of Appeals' reconciliation of Rule 62(a) and Supplemental Rule E(5)(c) is the only reported instance in which Supplemental

Rule E(5)(c) completely supercedes Rule 62(a). Again, the lower courts rejected petitioner's plea that this newly announced rule be limited to prospective effect.

The release of the *res* occurred under such circumstances and the new rules were applied in such a manner that petitioner's denial of notice and a meaningful opportunity to be heard cannot be seriously questioned. This denial of due process warrants review and reversal of the lower courts' actions.

3. This Court Should Not Permit the District Court's Ruling on the Constitutionality of Rule C to Stand.

The Court of Appeals did not consider the merits of petitioner's appeal of the District Court ruling that Rule C was unconstitutional absent a pre-seizure hearing. Petitioner submits, however, that this Court's resolution of the Rule C constitutionality issue would be justified because it would put to rest, in this circuit and in others that have not addressed the issue, questions about the validity of Rule C procedures. The issue is ripe for resolution now and this case presents a suitable vehicle for doing so.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

DATED: December 1, 1983.

Respectfully submitted,

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APPENDIX A.

In the United States Court of Appeals, Ninth Circuit.

Decided April 4, 1983.

Alyeska Pipeline Service Company, a Delaware corporation, individually and as agent for Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Corporation, Phillips Alaska Pipeline Company, Sohio Pipe Line Company and Union Alaska Pipeline Company,

Plaintiff-Appellant-Cross-Appellee

vs.

The Vessel Bay Ridge, her engines, masts, bowsprint, boats, anchors, chains, cable, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining, Defendant, and United States Trust Co., Richmond Tankers, Inc., Seatrain Lines, Inc., and Pierce Tankers, Inc.,

Claimants-Appellees-Cross-Appellants.

Appeal from the United States District Court for the District of Alaska.

Before KENNEDY and SKOPIL, Circuit Judges, and JAMESON,* District Judges.

SKOPIL, Circuit Judge:

INTRODUCTION

Alyeska Pipeline Service Company ("Alyeska") appeals the district court's grant of relief on The Vessel BAY RIDGE ("BAY RIDGE") motion to vacate arrest and to dismiss complaint.** The BAY RIDGE cross-appeals from the dis-

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*Montana, sitting by designation.

**The Maritime Law Association of the United States submitted a brief *amicus curiae* in support of Alyeska. We recognize the expertise of *amicus* and appreciate their participation.

trict court's conclusion that Alyeska's claim against the vessel gave rise to a valid maritime lien. The district court concluded the maritime lien was valid but the arrest of the BAY RIDGE pursuant to Fed.R.Civ.P. C (Supplemental Rules for Admiralty and Maritime Claims) ("Rule C"), violated the due process clause of the fifth amendment of the United States Constitution. The arrest was vacated, security held in place of the vessel was exonerated, and the case was dismissed.

FACTS

On May 19, 1980 Alyeska brought this action to recover costs it incurred cleaning up an oil spill near its tanker loading terminal in Valdez, Alaska. The action was brought *in rem* against the vessel BAY RIDGE. No *in personam* claims or actions were instituted.

Pursuant to Rule C, the vessel was arrested by the U.S. Marshal the day the complaint was filed. In accordance with Fed.R.Civ.P. E.(8) (Supplemental Rules for Admiralty and Maritime Claims), the owners of the vessel filed a restricted appearance for the purpose of defending Alyeska's claim against the vessel.

The vessel was released upon the issuance of a letter of undertaking. Shortly thereafter the letter of undertaking was replaced with another type of security, a stipulation for value in the amount of $450,000.

The vessel owners then moved to vacate the arrest and dismiss the complaint against the BAY RIDGE on the grounds that (1) Alyeska had no valid maritime lien, and (2) Rule C, the authority by which the vessel was arrested, violated claimants' fifth amendment due process rights. On March 16, 1981 the district court issued an opinion which concluded that an enforceable lien existed but that Rule C violated the fifth amendment. *Alyeska Pipeline Service Co.*

v. The Vessel BAY RIDGE 509 F.Supp. 1115 (D.Alaska 1981). The court vacated the arrest of the vessel and dismissed the case. *Id.*

On March 18, 1981, pursuant to Fed.R.Civ.P. E(8) (Supplemental Rules for Admiralty and Maritime Claims), the vessel owners moved for an order exonerating and releasing the stipulation for value. Alyeska did not move to stay the exoneration or release of the stipulation for value and did not file a supersedeas bond. On March 23, 1981 the court exonerated and released to claimants the stipulation for value. Alyeska's subsequent motions, including a motion to vacate the order of exoneration and to allow an *in rem* arrest of the exonerated stipulation for value were denied. Alyeska then filed a notice of appeal of the final judgment of dismissal and the post-judgment motions.

While the post-judgment proceedings in the first action were taking place, Alyeska filed a second *in rem* action, *Alyeska Pipeline Service Company v. BAY RIDGE*, (No. A81-137, D.Alaska, filed March 24, 1981), alleging claims nearly identical to those raised in the first action. The vessel counterclaimed for damages it allegedly suffered as a result of the arrest under Rule C which it asserts is unconstitutional. After a hearing, the district court warned that the vessel would be arrested unless security was posted by the vessel owners. A letter of undertaking was subsequently filed. In November 1981 Alyeska amended its complaint to add *in personam* claims against the vessel owners. The second action is now pending.

ISSUES

1. Did the exoneration of the stipulation for value posted for the release of the BAY RIDGE deprive the court of jurisdiction?
2. Was the exoneration of the stipulation for value proper?

DISCUSSION

A. Jurisdiction.

In an *in rem* admiralty action brought to enforce a maritime lien pursuant to Rule C, a vessel or other property against which the lien is asserted becomes the *res* or subject matter of the action. *See The Brig ANN*, 13 U.S. (9 Cranch) 289, 291, 3 L.Ed. 734 (1815) (Story, J.); *American Bank of Wage Claims v. Registry of Dist. Ct. of Guam*, 431 F.2d 1215 (9th Cir.1970). Jurisdiction over the *res* is obtained by arrest under process of the court. In absence of an arrest, no decree *in rem* can be rendered against the *res*. *Yokohama Specie Bank, Limited v. Chengting T. Wang*, 113 F.2d 329 (9th Cir.), *cert. denied*, 311 U.S. 690, 61 S.Ct. 71, 85 L.Ed. 446 (1940).

Admiralty procedures allow an arrested vessel to be released from custody upon the posting of security. *See* Fed.R.Civ.P. E(5) (Supplemental Rules for Admiralty and Maritime Claims). The stipulation for value, bond or other security is substituted for the vessel as the *res* subject to the court's jurisdiction. *J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332 (S.D.N.Y.1931). A plaintiff's lien for the claims alleged against the vessel is transferred to the security posted. *See generally*, G. Gilmore and C. Black, *The Law of Admiralty*, §§ 9-89 at 796-801 (2d ed. 1975).

In the absence of fraud or misrepresentation, the release of a vessel upon the posting of security discharges the lien against the vessel. *United States v. Ames*, 99 U.S. 35, 25 L.Ed. 295 (1879); *Southern Oregon Production v. Oil Screw SWEET PEA*, 435 F.Supp. 454, 459 (D.Or.1977).

The exoneration of security in this case deprived the court of jurisdiction. The stipulation for value, standing in place of the vessel as the *res* in this action, was released. There is nothing currently before the court on which to impose a

decision. The Supreme Court has stated:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895).

In *Canal Steel Works v. One Drag Line Dredge*, 48 F.2d 212 (5th Cir.), *cert. denied*, 284 U.S. 647, 52 S.Ct. 29, 76 L.Ed. 550 (1931), an arrested vessel was released after the district court dismissed a claim against it on jurisdictional grounds. The plaintiff appealed but did not file a supersedeas bond. Granting a motion to dismiss the appeal the court stated: "By failure of appellant to obtain supersedeas, the seizure was released, and there is now no subject matter upon which the judgment of the court could operate and give relief to appellant. The case has become moot." 48 F.2d at 213. This court adopted the rule of *Canal Steel Works* in *Martin v. The BUD*, 172 F.2d 295 (9th Cir.1949). We applied the rule to the release of a jurisdictional substitute for a vessel in *American Bank of Wage Claims v. Registry of Dist. Ct. of Guam*, 431 F.2d 1215, 1218 (9th Cir.1970). *Accord, Bank of new Orleans and Trust v. Marine Credit Corp.*, 583 F.2d 103, 1068 (8th Cir. 1978). In the case at bar both the vessel and its jurisdictional substitute have been released. Unless the release of the security was improper we are without jurisdiction.

B. Exoneration.

Alyeska argues that this case falls directly under the rule articulated in *The RIO GRANDE*, 90 U.S. (23 Wall.) 458, 23 L.Ed. 158 (1874). *The RIO GRANDE* was arrested and placed in the custody of the U.S. Marshal. An appeal was taken from the district court's dismissal of the plaintiff's claims. On plaintiff's motion, a stay of the proceedings in the district court was granted. While the stay was still in effect, the district court improperly allowed the RIO GRANDE to be released from the Marshal's custody. Upon a claim that the release of the vessel destroyed *in rem* jurisdiction; the Supreme Court held that the improper release did not destroy jurisdiction.[1]

Alyeska argues that the exoneration of the security was improper because the district court ignored the automatic stay provision of Fed.R.Civ.P. 62(a)[2] Fed.R.Civ.P. 62(a) imposes an automatic stay of enforcement for ten days after the entry of a judgment.[3] Alyeska argues that Rule 62(a) should have prevented the exoneration until at least March 27, ten days after entry of the court's judgment. Alyeska contends that this would have given it sufficient time to move to block exoneration and thereby preserve the juris-

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[1]"We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject matter, and that an accidental or fraudulent or improper removal of it from his custody . . . does not destroy jurisdiction. In the present case, the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the circuit court." *The RIO GRANDE v. Otis*, 90 U.S. (23 Wall.) 458, 465, 23 L.Ed. 158 (1874).

[2]Alyeska also argues that Local Rule 5 was ignored. The same arguments that justify not following Rule 62 also justify not following Rule 5. A separate discussion of Rule 5 has therefore been omitted.

[3]"Except as stated herein, no exception shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry." Fed.R.Civ.P. 62(a).

diction of the court on appeal.

Fed.R.Civ.P. A (Supplemental Rules for Admiralty and Maritime Claims) provides that "the general Rules of Civil Procedure for the United States District Courts are also applicable to the [admiralty] proceedings except to the extent that they are inconsistent with these Supplemental Rules." If an admiralty rule permits the exoneration prior to the expiration of the ten day automatic stay then Alyeska's arguments regarding application of Rule 62(a) must fail.

Fed.R.Civ.P. E(5)(c) (Supplemental Rules for Admiralty and Maritime Claims) governs the release of security from the hands of the court. It provides in relevant part that "no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered *as of course* by the clerk . . . upon the dismissal or discontinuance of the action. . . ." Fed.R.Civ.P. E(5)(c) (emphasis added). Exoneration of security in the admiralty context is a ministerial act by the clerk of the court as a matter of course upon termination of the action. Since the Rule 62(a) automatic ten-day stay is inconsistent with Rule E(5)(c), Rule 62(a) must give way. Fed.R.Civ.P. A.

When plaintiffs choose to proceed *in rem* they must take the necessary precautions to ensure that jurisdiction of the court is preserved. Plaintiffs always have the option of bringing these actions *in personam* as well as *in rem*, which would foreclose the loss of jurisdiction. Plaintiffs can also ask the trial judge to stay imposition of the judgment until they can move to preserve the jurisdiction of the court. If plaintiffs fail to exercise either of these options, they still have a chance to preserve jurisdiction by posting their own security before the security of the defendant is released. Given these alternatives, plaintiffs are not denied the opportunity to the meaningful exercise of the right to appeal

by permitting release of the *res* at any time following termination of the case.

CONCLUSION

Since exoneration was proper, *The RIO GRANDE* rule does not apply. Since the stipulation for value was the substituted *res* before the court, its exoneration deprives this court of jurisdiction. We therefore dismiss the appeal without considering the merits of the district court's decision. Our decision in no way precludes the litigation of any issues pending before the district court in *Alyeska Pipeline Service Co. v. The Vessel BAY RIDGE*, D.C.Civ. No. A81-137 (filed March 24, 1981).

KENNEDY, Circuit Judge, concurring:

I agree the case should be dismissed, but for the reason that the constitutional question it presents is moot, and not, as the majority holds, because the case evaporated when the clerk acted to release the security before the usual ten day period of stay designed to protect the rights of an appellant.

It is not necessary to find an inconsistency between Fed.R.Civ.P. 62(a) and the applicable admiralty rule, Fed.R.Civ.P. E(5)(c). The declaration in E(5)(c) that security shall be released "as of course" does no more than authorize the clerk to release security without a separate order of the court once the dismissal or continuance has become enforceable. The time for enforceability of a judgment, however, should be determined by Rule 62(a), in admiralty cases where security is posted, just as is true in other cases. Rule 62(a) provides for an automatic ten day stay provision, a stay which serves the purpose of protecting the rights of appellants. To interpret the rules consistently in this respect is not only good practice, but also avoids the unfortunate result caused by the court's holding. In future

cases, the district court and a court clerk can cause substantial rights of the parties to disappear before there is resort to the appellate system. The suggestion by the majority that the appellant can post a bond when he is the party who seeks security for the ultimate enforcement of his judgment is not a satisfactory answer to the problem the majority's interpretation presents.

The appeal here should be dismissed nevertheless. The parties have advised the court that in *Alyeska Pipeline Service Co. v. The Vessel BAY RIDGE*, D.C.Civ. No. A81-137, there is uncontested jurisdiction to resolve the liability issues that are at the core of this dispute. It is wholly unnecessary, therefore, to reach the constitutional issues presented on this appeal. I would dismiss the appeal as moot.

APPENDIX B.

In the United States District Court for the District of Alaska.

(Decided March 16, 1981)

Civil No. A 80-147.

Alyeska Pipeline Service Company, a Delaware corporation, Individually and as Agent for Amerada Hess Pipeline Corp., ARCO Pipeline, Co., BP Pipelines, Inc., Exxon Pipeline Company, Phillips Alaska Pipeline Company, Sohio Pipeline Company and Union Alaska Pipeline Company,

Plaintiff,

vs.

The Vessel Bay Ridge, her engines, masts, bowsprit, boats, anchors, chains, cable, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining, Defendant, and United States Trust Company, Richmond Tankers, Inc., Seatrain Lines, Inc., and Pierce Tankers, Inc.,

Claimants.

Fitzgerald, District Judge.

In this admiralty action Alyeska Pipeline Service Company undertakes to recover cleanup costs resulting from an accidental oil discharge at the Alyeska Valdez Terminal on April 14, 1980. Alyeska maintains the discharge was due to the negligence of the T/T BAY RIDGE and claims a maritime lien against the vessel. On May 19, 1980 the BAY RIDGE was arrested pursuant to Supplemental Rule C of

the Federal Rules of Civil Procedure.[1] Claimants now move

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[1]Supplemental Rule C of the Federal Rules of Civil Procedure [hereinafter Rule C] reads as follows:

Rule C. Actions In Rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the

(footnote continued on following page)

to vacate the arrest and dismiss the complaint against the vessel on grounds that Rule C violates fundamental due process standards guaranteed by the Fifth Amendment to the United States Constitution and is, therefore, unconstitutional. Claimants further contend that under the circumstances, Alyeska has no in rem claim.

The BAY RIDGE is a 225,000 deadweight ton tanker of United States registry built in 1978-1979 at Brooklyn Naval Shipyard, Brooklyn, N.Y. The vessel is owned by U. S. Trust Company, New York, and is bareboat chartered to Richmond Tankers, time chartered to Seatrain Lines, Inc., sub-time chartered to Pierce Tankers, Inc.,[2] and operated by Bay Tankers, Inc. The vessel entered service on February 22, 1980 and arrived at Valdez on April 13, 1980 on her maiden voyage docking at Berth #5, Alyeska Terminal.

Because the vessel's tanks were oil free, Alyeska requested and received permission from the Alaska Depart-

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control of the court because it is intangible property in the hands of a person who has not been served with process, the court may, on motion order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

[2]United States Trust Company, Richmond Tankers, Inc., Seatrain Lines, Inc., and Pierce Tankers, Inc., are claimants in this action.

ment of Environmental Conservation to discharge ballast into the sea rather than into the terminal's ballast treatment plant. After approximately five and one-half hours of pumping, the chief officer of the BAY RIDGE noted muddy water coming from the area near the sea valve opening located on the bottom of the vessel. He transferred suction to another cargo tank and later, by agreement with Alyeska personnel, made arrangements to pump into the ballast treatment plant.

At approximately 0938 on April 14, 1980, the terminal reported to the vessel that it had opened all appropriate valves in its dirty ballast lines and was ready to receive ballast ashore. Shoretly thereafter oil was observed in the seawater between the vessel and the dock and transfer operations were immediately halted. The Department of Environmental Conservation estimated that approximately 1,000 gallons (24 barrels) of crude oil spilled into the harbor.

It is undisputed that the spilled oil escaped from Alyeska's own dirty ballast line. It now appears that as the BAY RIDGE attempted to begin pumping its clean ballast ashore, the head pressure in the dirty ballast line caused the oily ballast contained in the line — ballast which had been discharged by prior vessels — to be discharged into the vessel's piping system through the vessel's sea valve into Valdez Harbor. Each side alleges the spill occurred due to the negligence of the other.

Alyeska in compliance with the Trans-Alaska Pipeline Authorization Act,[3] promptly initiated cleanup efforts. After considerable delay, the BAY RIDGE completed loading and on April 19, 1980, departed Valdez for Panama. When she returned to Valdez on May 19, on her next scheduled call,

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[3]43 U.S.C. §1653(b) (1980).

she was arrested by the U. S. Marshal.[4]

Claimants' initial contention is that the complaint fails to state a claim giving rise to an in rem action against the vessel. In order to bring such an action the plaintiff's claim must create a maritime lien.[5] Claimants suggest that costs of removing oil from navigable waters do not establish a maritime lien enforceable by a private party. But in *California Department of Fish and Game v. S.S. BOURNEMOUTH*,[6] a suit for cleanup costs incurred by the State of California due to an oil spill, it was held that oil pollution of navigable waters amounted to a maritime tort giving rise to a maritime lien sufficient to support an in rem proceedings. There the court stated:

> Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse in rem against the offending vessel for damages to compensate for the loss.[7]

Although claimants argue that the holding in *BOURNEMOUTH* ought to be limited to those cases where govern-

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[4]Following the procedures of Rule C, the arrest warrant was issued by the clerk of the court, without any judicial participation, based on allegations of negligence and unseaworthiness contained in the complaint which was verified on information and belief by plaintiffs' counsel. No bond was posted. On May 20, 1980 claimants brought a motion for hearing on shortened time to prescribe security for release of the vessel which was heard by the United States Magistrate. The vessel was released on May 21, 1980 on bond of $450,000.

[5]THE RESOLUTE, 168 U.S. 437, 440 (1897); THE DUTCHESS, 15 F.2d 198, 199 (E.D.N.Y. 1926).

[6]307 F.Supp. 922 (C.D. Calif. 1969).

[7]*Id.* at 929.

mental agencies incur the cleanup costs, I can see little justification for such a rule. Where private parties such as Alyeska are, by statute, made responsible for protecting the public interest recourse should be available through in rem proceedings against the offending vessel. Accordingly, I conclude the complaint of Alyeska states a claim sufficient to support an action in rem against the BAY RIDGE.

Claimants also challenge the procedure by which the BAY RIDGE was arrested. They contend that Rule C violates the principles of procedural due process as enunciated in the United States Supreme Court's decisions in *Sniadach v. Family Finance Corp.*,[8] *Fuentes v. Shevin*,[9] *Mitchell v. W.T. Grant Co.*,[10] and *North Georgia Finishing v. Di-Chem.*[11]

In *Sniadach v. Family Finance Corp.* the Supreme Court struck down Wisconsin's prejudgment wage garnishment procedure as a deprivation of property without due process of law, noting that "the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have. . . ."[12]

Although some thought that the *Sniadach* holding was limited to the narrow issue of garnishment of wages,[13] the Court's subsequent decision in *Fuentes v. Shevin* made it clear that an opportunity for a hearing prior to a taking was a constitutional requirement regardless of the characteristics of the property involved. In *Fuentes* the Court struck down

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[8]395 U.S. 337 (1969).

[9]407 U.S. 67 (1972).

[10]416 U.S. 600 (1974).

[11]419 U.S. 601 (1975).

[12]395 U.S. at 339.

[13]*See e.g.*, Note, *Some Implications of Sniadach*, 70 Columbia L. Rev. 942 (1970). Several courts also narrowly limited *Sniadach*. *See e.g.*, Brunswick Corp. v. J. & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Epps v. Cortese, 326 F.Supp. 127, 133 (E.D. Pa. 1971).

Florida and Pennsylvania laws authorizing the summary seizure of personal property under a writ of replevin. Both statutes provided for writs ordering state agents to seize such possessions, simply upon an *ex parte* application accompanied by a security bond. Neither statute provided for notice to one in possession of the property, or provided an opportunity to challenge the seizure at a prior hearing. However, the property might be recovered within three days after seizure if a recovery bond was substituted for the property.

The Court began its analysis of the challenged statutes by explaining:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552.[14]

The Court recognized that notice and a hearing are ordinarily required before property can be taken, although it explained:

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U.S., at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an

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[14]407 U.S. at 80.

> important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[15]

Seizure by self-interested private parties is not an "extraordinary situation."[16]

The *Fuentes* court concluded "that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."[17]

Some commentators have suggested that, in *Mitchell v. W.T. Grant Co.*, the Court may have retreated from its holdings in *Fuentes* and *Sniadach*. In *Mitchell*, the Court upheld Louisiana sequestration procedures allowing prejudgment seizure without prior notice or opportunity to be heard. The Court focused on the joint interest of both the seller and the buyer in the property seized, and explained "[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[18] After examining the Louisiana statute, the Court found three provisions dispositive: (1) the statute provided for judicial supervision of the writ issuing procedure; (2) the statute required that the writ issue only if the basis of the claim was shown in a verified petition or

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[15]*Id.* at 90-91 (footnotes omitted).
[16]*Id.* at 92-93.
[17]*Id.* at 96.
[18]416 U.S. at 604.

affidavit containing specific, non-conclusory facts; and (3) the statute provided for an immediate post-seizure hearing.[19] Upon balancing the rights of the buyer and seller, the Court concluded that these procedural protections effected "a constitutional accommodation of the conflicting interests of the parties."[20] The procedural protections built into the Louisiana statute eliminated any requirement for an opportunity to be heard preceding seizure.

In *North Georgia Finishing, Inc. v. Di-Chem., Inc.*, the most recent decision on the subject, the Court struck down a Georgia garnishment statute. Under the statute a writ of garnishment was issuable by the court clerk on an affidavit of a creditor or his attorney. The affidavit had only to contain conclusory allegations, and the statute included no provisions for an early post-seizure hearing.[21] Reaffirming the principles expressed in *Fuentes*, the Court struck down the statute as inadequate under the Due Process Clause of the Fourteenth Amendment.

The approach taken by the Court in these cases is consistent with the oft repeated observations that:

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." [Cite omitted]. Due process of law guarantees "no particular form of procedure; it protects substantial rights." [Cite omitted]. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [Cite omitted].[22]

The Court's determination of what due process requires in a given context has depended on a consideration of the

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[19]*Id.* at 605-606, & 615-18.

[20]*Id.* at 607.

[21]419 U.S. at 607.

[22]Mitchell v. W. T. Grant Co., 416 U.S. at 610 (citations omitted).

nature of the governmental function involved and the private interests affected.[23] As a general rule in order to satisfy due process the Court's approach requires, at a minimum, that before seizure a judicial official review the specific facts underlying the claim. Due process requires as well the opportunity for a prompt post-seizure judicial hearing and an opportunity to obtain release of the seized items upon posting of adequate security.[24]

Admiralty Rule C fails to provide these minimum protections. The *ex parte* warrant of arrest is issued, as of course, by the clerk without judicial participation. Although the complaint supporting the arrest must be verified, it need contain only conclusory allegations and may be verified on information and belief by counsel. No bond prior to arrest is required. As in *Sniadach*, prompt notice to the owner of the vessel need not be given, and notice by publication may be sufficient. Finally, while a prompt post-seizure hearing can usually be obtained under local rules or custom, nothing in Rule C or the Local Admiralty Rules of this district *assures* that a prompt post-seizure hearing can be obtained. The procedures required by Admiralty Rule C fail to provide the due process standards now well established by the Supreme Court.

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[23]*See* Mitchell v. W. T. Grant Co., 416 U.S. at 624 (Powell, J. concurring).

[24]*Cf.* Grand Bahama Pet. Co. Ltd. v. Canadian Transp. Agencies, Ltd., 450 F.Supp. 447, 459 n. 84 (W.D. Wash. 1978) (holding Rule B unconstitutional). *See also* Note, *Due Process in Admiralty Arrest and Attachment*, 56 Texas L. Rev. 1091 (1978); Note, *The Due Process Mandate and the Constitutionality of Admiralty Arrests and Attachments Pursuant to Supplemental Rules B and C*, 12 Vanderbilt J. of Transn. Law 421 (1979).

Seven prior decisions, including those of this court, have upheld the constitutionality of Rule C in various contexts.[25] Many of these decisions rely upon the "extraordinary situation" exception in *Fuentes*.[26] Pursuing this analysis courts have often cited *Ownbey v. Morgan*[27] for the holding that seizure prior to hearing is permissible where necessary to secure the jurisdiction of the court.[28] Whether *Ownbey* ever stood for such a proposition is questionable, however.[29] In *Ownbey* the Court upheld the constitutionality of a Delaware attachment statute which precluded the entry of appearance and defense by a nonresident defendant whose property had been attached, except upon posting of special bail. Ownbey, who could not post the bail, attacked the bail requirement.

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[25]*See e.g.*, United States v. KAIYO MARU No. 53, 503 F.Supp. 1075 (D. Alaska 1980); Merchants Nat. Bank v. Dredge General G.L. GILLESPIE, 488 F.Supp. 1302 (W.D. La. 1980); Amstar Corp. v. M/V ALEXANDROS T., 431 F.Supp. 328 (D. Md. 1977); Central Soya Co. v. Cox Towing Corp., 417 F.Supp. 658 (N.D. Miss. 1976); A/S Hjalmer Bjorges Rederi v. The Tugboat CONDOR, 1979 A.M.C. 1696 (S.D. Cal. 1979); Stoner v. O/S NEISKA II, 1978 A.M.C. 2650 (D. Alaska 1978); Bethlehem Steel Corp. v. S/T VALIANT KING, 1977 A.M.C. 1719 (E.D. Pa. 1974). Other courts have expressed doubts about the constitutionality of the rule or held the rule unconstitutional. *See e.g.*, Karl Senner, Inc. v. M/V ACADIAN VALOR, 485 F.Supp. 287 (E.D. La. 1980); Techem Chemical Co. v. M/T CHOYO MARU, 416 F.Supp. 960 (D. Md. 1976); P.C. International, Inc. v. Vessel SUSAN, 1980 A.M.C. 2062 (S.D. Fla. 1980).

[26]*See e.g.*, United States v. KAIYO MARU No. 53, 503 F.Supp. 1075 (D. Alaska 1980); Central Soya Co. v. Cox Towing Corp., 417 F.Supp. at 662-64; A/S Hjalmer Bjorges Rederi v. The Tugboat CONDOR, 1979 A.M.A. at 1702; Stoner v. O/S NEISKA II, 1978 A.M.C. at 2651.

[27]256 U.S. 94 (1921).

[28]*See e.g.*, Central Soya Co. v. Cox Towing Corp., 417 F. Supp. at 663-64; Stoner v. O/S NEISKA, II, 978 A.M.C. at 2651. *Cf.* Merchants Nat'l Bank v. Dredge General G.L. GILLESPIE, 488 F.Supp. at 1305 and A/S Hjalmer Bjorges Rederi v. The Tugboat CONDOR, 1979 A.M.C. 1702 (using the rationale without citing the *Ownbey* case.)

[29]*See* Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?* 3 Fla. St. Univ. L.Rev. 1, 12-16 (1975).

The Court upheld the statute and, in dictum, approved the attachment as well. *Ownbey* was cited in *Fuentes* and *Mitchell* for the propositions that due process does not require that foreign attachments be preceded by notice and a hearing, and it has been suggested that the case must be limited to that.[30] Moreover, the continuing vitality of *Ownbey* is doubtful given the Supreme Court's recent decision in *Shaffer v. Heitner*.[31] There, the Court held that all assertions of jurisdiction should be measured by the general standard of minimum contacts as first announced in *International Shoe v. Washington*.[32] *Shaffer* invalidated the use of quasi in rem jurisdiction as an intrinsically adequate basis of jurisdiction[33] and specifically stated that "[w]e do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause."[34] The Court went on to overrule all prior decisions to the extent they were inconsistent with *Shaffer*.[35] I conclude therefore that *Ownbey* holds little precedential value after *Shaffer*.[36]

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[30]Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1128 (3d Cir. 1976).

[31]433 U.S. 186 (1977).

[32]326 U.S. 310 (1945).

[33]It has been suggested by some commentators that *Shaffer* mandates that the remedy of maritime attachment should also be measured by the minimum contact standard and that jurisdiction in rem or quasi in rem should not attach in an admiralty context if minimum contacts are not present. *See* Olsen, *Jurisdiction in Admiralty: Pennover v. Neff in Ship's Clothing?*, 84 Dick L. Rev. 395 (1980). Court have not agreed however, exempting maritime attachment from the reach of *Shaffer*. *See* Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd., 450 F.Supp. at 452-55; Engineering Equip. Co. v. S.S. SELENE, 446 F.Supp 706 (S.D. N.Y. 1978) I need not decide this issue as both parties concede that under the facts of this case sufficient minimum contacts over claimants exist.

[34]433 U.S. at 194 n. 10.

[35]*Id.* at 212 n. 39.

[36]*See also*, Karl Senner, Inc. v. M/V ACADIAN VALOR, 495 F.Supp. at 291.

The Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[37] has suggested that acquiring jurisdiction is not an end in itself unless accomplished in service of an important governmental or public interest. When only private interests are involved the "extraordinary situation" exception is not established.[38] As noted by one court:

> Application of jurisdiction-securing devices must, therefore, be narrow, and linked to an important governmental or public interest. The need to assess "the costs the procedure exacts [of] private interests," must not replace procedural safeguards when the seizure is initiated by self-interested private parties.[39]

I conclude that when a vessel arrest is initiated by private parties the "extraordinary situation" exception of *Fuentes* or the use of seizure to obtain in rem jurisdiction does not legitimate the use of Rule C to effectuate the arrest absent the procedural safeguards mandated by *Sniadach-Fuentes* and their progeny.

Previous decisions of this court do not require a different conclusion. In *Stoner v. The Oil Screw NEISKA II*,[40] Judge von der Heydt held Rule C constitutional based on the citation in *Fuentes* to *Ownbey*,[41] reasoning that this reference created an exception to the *Fuentes* rule where seizure was necessary to obtain in rem jurisdiction. *Stoner* was decided before *Shaffer* which, as previously discussed, casts doubt upon the validity of such an exception. *Stoner* also involved truly exigent circumstances as the owner allegedly had already attempted to conceal the vessel by illegally changing its name, and had also threatened to scuttle it.

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[37] 416 U.S. 663, *rehearing denied* 417 U.S. 977 (1974).
[38] Fuentes v. Shevin, 407 U.S. at 90-93.
[39] Karl Senner, Inc. v. M/V ACADIAN VALOR, 485 F.Supp. at 292.
[40] 1978 A.M.C. 2650 (D. Alaska 1978).
[41] 407 U.S. at 91 n. 23.

This court has also upheld constitutionality of Rule C in *United States v. KAIYO MARU No. 53*.[42] There, seizure was made by the United States Coast Guard in order to enforce provisions of the Fisheries Conservation and Management Act.[43] I held that the seizure satisfied the "extraordinary situation" exception recognized in *Fuentes* and more fully explained in *Calero-Toledo*. Seizure and arrest of vessels play a crucial role in enforcement of the FCMA, thereby serving significant governmental purposes. Such enforcement would be difficult, if not impossible, were advance warning of seizure necessary. Finally, in *KAIYO MARU* the seizure and arrest of the vessel was not initiated by self-interested private parties but was done under direction of the Coast Guard after consultation with the United States Departments of State and Commerce. That Rule C was found constitutional in *KAIYO MARU* lends no support for its constitutionality under the facts of this case.

I conclude that under the circumstances of this case the arrest of the BAY RIDGE under Rule C violates the fundamental due process standards required by the Fifth Amendment of the United States Constitution and is, therefore, invalid.[44] What procedure might be valid is not now

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[42] 503 F.Supp. 1075.

[43] 16 U.S.C. §§1801-1882 (1978).

[44] It has been suggested that a federal district court lacks jurisdiction to declare a rule promulgated by the Supreme Court of the United States unconstitutional. Harris v. Zion's Savings Bank, 127 F.2d 1012, 1015 (10th Cir. 1942) *aff'd* 317 U.S. 447 (1943); Bethlehem Steel Corp. v. S/T VALIANT KING, 1977 A.M.C. at 1726. However, I find that in promulgating the Admiralty Rules the Supreme Court is acting in a rulemaking capacity as an administrative body designated by the Congress and thus has only the power which Congress could have exercised. Had Congress enacted Rule C this court could clearly have considered its constitutionality. Grand Bahamas Pet. Co., Ltd. v. Canadian Transp. Agencies, 450 F.Supp. at 449-51. Finally, I am not at all hesitant to declare the rule as applied unconstitutional . . . who knows, I may never have another chance.

before this court.[45] As the Supreme Court has often explained, due process is a flexible concept. Maritime liens supporting in rem jurisdiction and the arrest of a vessel arise in a variety of circumstances.[46] Procedures must therefore vary depending on the nature of the lien, the ownership interest of the party seeking arrest in the vessel, the possibility that the vessel will flee the jurisdiction and the governmental interest involved in the action. I observe, however, that in most cases involving private parties, due process would minimally appear to require the filing of non-conclusory allegations, judicial participation in issuance of the writ, and the opportunity for an immediate post-seizure hearing.

The arrest of the vessel BAY RIDGE is vacated and the case is DISMISSED.

DATED at Anchorage, Alaska, this 16th day of March, 1981.

/s/ James Fitzgerald
JAMES M. FITZGERALD
United States District Judge

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[45]When local court rules add the steps demanded by the procedural due process requirements of the Constitution, Rule C is constitutional. *See e.g.* Amstar Corp. v. M/V ALEXANDROS T., 431 F.Supp. at 332-34 where the court expressed grave doubts about the constitutionality of Rule C, but upheld it, in part because local rules required that a Chambers Judge be available nights and weekends, which was found to meet the *Mitchell* requirement of a speedy post-seizure hearing opportunity. *Cf.* Merchants Nat. Bank v. Dredge GILLESPIE, 488 F.Supp. at 1304-05, where the court pointed to "instanter" post-seizure hearing procedures provided under local rules in upholding Rule C.

[46]*See generally*, Note, *Due process in Admiralty Arrest and Attachment*, 56 Texas L. Rev. 1091, 1093-94 (1978).

APPENDIX C.

In the United States District Court, District of Alaska, at Anchorage.

Civil No. A 81-137.

Alyeska Pipeline Service Company, a Delaware corporation, Individually and as Agent for Amerada Hess Pipeline Corporation, ARCO. Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Phillips Alaska Pipeline Company, Sohio Pipe Line Company and Union Alaska Pipeline Company,

Plaintiff,

vs.

The Vessel Bay Ridge, her engines, masts, bowsprit, boats, anchors, chains, cable, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining, Defendant, and United States Trust Company, Richmond Tankers, Inc., Seatrain Lines, Inc., and Pierce Tankers, Inc.,

Claimants.

Order.

This action was brought by plaintiff on March 24, 1981. The *in rem* complaint filed herein alleges damages arising out of an oil spill incident which are identical to the damages claimed in the *in rem* complaint filed in this court by plaintiff in *Alyeska Pipeline Service Company v. BAY RIDGE*, (Cause A 80-147 Civil) (hereinafter "the first action"). In the first action the vessel was arrested by the U.S. Marshal pursuant to Rule C. Claimants moved for release of the vessel pursuant to Rule E(5). Plaintiff did not oppose the release of the vessel, but the parties could not agree on the nature and amount of security to be posted. After two hearings, the vessel was ordered released upon the posting of a $450,000 letter of undertaking executed by the vessel's protection and

indemnity insurer, which, under the terms of the release order, was followed within 14 days by a stipulation for value in the same amount. The stipulation for value was executed by Richmond Tankers, Inc., as principal, and National Surety Corporation, as corporate surety. At no time has plaintiff claimed that any fraud, misrepresentation or irregularity of any kind occurred with respect to the posting of security.

On March 17 a judgment of dismissal was entered in the first action. Claimants then moved to exonerate the stipulation of value filed in that action which was granted as of course, as allowed by Rule E(5)(c). Plaintiff took no steps to stay the exoneration of the security, to post bond or to commence an immediate appeal. However, subsequent to the filing of this action, plaintiff has moved to amend the judgment in the former action.

Upon the filing of the complaint herein, claimants brought a motion on shortened time to forebear issuance or to quash the writ of arrest and to dismiss the complaint. The hearing was held the same day, at which time the court denied claimants' motion and stated that arrest would be ordered unless security satisfactory to plaintiff and the court was arranged. Subsequently, a letter of undertaking was approved by plaintiff and posted with the court.

Claimants now move for reconsideration of the order denying claimants' motion to dismiss. As before, claimants argue that the BAY RIDGE, having been discharged on bond in the first action, cannot be rearrested on the same cause of action, even where dismissal of the first action occurred without prejudice.

I reject this contention. Most of the cases relied upon by claimants involve situations where the vessel was discharged after an adjudication of the various claims on the merits and dismissal of the claims was entered with prejudice. In only

two cases was the rule urged by claimants applied where dismissal occurred without prejudice. In *THE GASCONIER*, 8 F.2d 104 (E.D.N.Y. 1924) the rule was applied where plaintiff deliberately abandoned the first action against the vessel and then attempted to rearrest the vessel two months later. In *THE CLEVELAND*, 98 F. 632 (D. Wash. 1899), the first *in rem* action filed in *forma pauperis* was dismissed without prejudice after the court determined that plaintiff's assertions of poverty were untrue. In both cases the rule for which claimants argue was applied with no analysis. Modern concepts of procedure and the development of due process notions in admiralty make the two cases relied upon neither persuasive nor binding, and I decline to follow them.

The first action against the BAY RIDGE was dismissed because I held that the arrest of the vessel did not comport with modern concepts of due process. Due process requires as well that the antiquated rule urged by claimants not be followed under the circumstances of this case. Although claimants contend that the rule properly balances the rights of the parties, it is clear that in this case the rule would prejudice plaintiff and would undermine my intent that the previous dismissal be *without prejudice*.

The motion for reconsideration is DENIED.

ORDERED ACCORDINGLY.

Dated at Anchorage, Alaska, this 15th day of April, 1981.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

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